83 - 1754

NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAULETTE THOMPSON MASSEY,

Petitioner

vs

EMERGENCY ASSISTANCE, INC., ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Whether there was a nexus of employment relationship between the City of Kansas City, Missouri, and Emergency Assistance, Inc., which would constitute the City of Kansas City, Missouri, as an employer cognizable under Sec. 704(a),

Title VII, 42 U.S.C. Sec. 2000-e?

2. Whether Emergency Assistance, Inc., whose sole purpose was to distribute Model Cities program funds supplied by the City of Kansas City, Missouri, and whose entire operation was strictly monitored by the City, inter alia, is an agent of the City of Kansas City, Missouri, for purposes of meeting the jurisdictional requirements of Title VII, 42 U.S.C. §2000-e et seq?

3. Whether the test applied in determining the relationship between two (2) private entities as an employer is applicable when a governmental sub-division is an alleged employer?

4. Whether the trial court erred in sustaining the City of Kansas City, Missouri's Motion for Directed Verdict against Petitioner's claim of sex discrimination asserted under 42 U.S.C. §1983?

LIST OF ALL PARTIES

Plaintiff Below:

PAULETTE THOMPSON MASSEY

Defendants Below:

EMERGENCY ASSISTANCE, INC. and

CITY OF KANSAS CITY, MISSOURI

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The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the District Court for the Western District of Missouri, also appears in the Appendix hereto.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals for the Eighth Circuit was entered on January 11, 1984. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVED

The Fourteenth Amendment to the United States Constitution states:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. Section 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

A person under 42 U.S.C. Section 2000-e (a) is:

"One or more individuals, governments,

governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives..."

42 U.S.C. Section 2000-e (b) defines employer as:

"A person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year and any agent of such a person."

STATEMENT OF THE CASE

This is an action for sex discrimination and retaliation brought pursuant to Title VII, 42 U.S.C. Section 1983. The matter was tried to a jury on the Section 1983 claim and to the Court on the Title VII claim. Petitioner voluntarily dismissed her Section 1983 claim against Emergency Assistance, Inc., because at the time of trial, Emergency Assistance, Inc. became defunct without no assets.

In November, 1971, the City of Kansas City, Missouri, received funds from the United States Department of Housing and Urban Development (HUD) pursuant to Title I of the Demonstration Cities and Metropolitan Development Act of 1966, for what

is commonly known as the Model Cities program. Emergency Assistance, Inc. was created in or about 1971 for the purpose of providing emergency monetary assistance to the poor, utilizing Model Cities program funds supplied by the City of Kansas City, Missouri, through the City's City Demonstration Agency (CDA). The Board of Directors of Emergency Assistance, Inc. was appointed by the Mayor of Kansas City, Missouri. The City and Emergency Assistance entered into contracts whereby the City provided Model Cities funds to Emergency Assistance to operate an emergency money assistance program for the poor in Model Cities program areas for the years 1971-1975. Emergency Assistance had no other purpose than distributing emergency Model Cities funds to the poor for the City's

Model Cities program.

Emergency Assistance made determination of eligibility of applicants for emergency funds, distributed funds to those eligible and paid its own operating expenses and received reimbursement from the City. Pursuant to HUD guidelines and the agreement between the City and Emergency Assistance, the City had city employees train Emergency Assistance employees in the interviewing process. An employee of the City sat on the Board of Directors committee (ex officio) and monitored the operations of the corporation.

The City additionally required that Emergency Assistance submit job descriptions for each employment position de-

tailing the duties, minimum qualifications and salary range therefor; that it register any employment vacancies with the CDA, advertise and interview simultaneously with the CDA for those positions, and request referrals of qualified applicants from the CDA job bank; that it obtain approval from the CDA, based upon justification, for hiring an employee who was not a model neighborhood resident; that it submit a monthly report to the CDA on employee status, including salary changes; that it adopt a plan of salary and wage administration; that it prohibit any employee from occupying a conflicting job position; that it provide a specified amount of release time for employees who were pursuing career development train-

ing and provide for pay increases for those who successfully completed such training; that it establish a suitable procedure for handling disciplinary actions and grievences; that it notify the CDA of any suspension or termination of personnel; that it provide a right of appeal to the Model Cities Board of Appeal and Review in connection with employee disputes; and that it permit the CDA to attempt conciliation with respect to any employee disputes.

Petitioner, Paulette Thompson Massey, a Black female, commenced her employment as Administrative Officer with Emergency Assistance on April 17, 1972. She applied for the position at the personnel department of the City of Kansas City,

Missouri, as did a few other applicants for employment with the corporation near its inception. Petitioner had the responsibility of establishing office procedures and generally getting the office in operating condition. Additionally, she assisted in training staff and generally assisted the director.

Petitioner was terminated in August, 1974. She subsequently filed a complaint with the Equal Employment Opportunity Commission (EEOC) on August 30, 1974. As a result of a hearing before the Model Cities Board of Appeal and Review, Petitioner was reinstated with back pay.

Emergency Assistance, Inc. advertised for applicants for the position of Director in December, 1974. Petitioner

submitted her application in response to the advertisement in the same month. Because of previous work experience, on-the-job experience with Emergency Assistance and her educational background, Petitioner was qualified for the position. Though she was qualified, Petitioner was not hired. Emergency Assistance re-advertised for the position in April, 1975, but Petitioner did not re-apply.

Following her application for the position, Petitioner was told by James Jackson, a member of the Board of Directors of Emergency Assistance and Chairman of the personnel committee, that the Board would not consider a female for the position because a female could not

handle the job.

Subsequently, a male was hired for the position. Petitioner was subsequently terminated. She filed another complaint with EEOC on June 24, 1975, charging discrimination on the basis of her sex for denying her a promotion to the position of Director. She amended the complaint to include the City of Kansas City, Missouri, on December 1, 1975. On December 3, 1979, EEOC rendered and issued its determination of reasonable cause to the allegations of discrimination. EEOC issued its letter of right to sue on June 3, 1980.

The District Court sustained Kansas City, Missouri's Motion for Directed

Verdict on the Section 1983 claim at the close of Petitioner's evidence. The Court dismissed the Title VII claim for lack of subject matter jurisdiction because Respondents were not employers within the meaning of Title VII. The Eighth Circuit Court of Appeals upheld the District Court's decision with the Chief Justice dissenting. See Appendix 1.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS IN THE CRITERIA USED TO DETERMINE WHETHER A PERSON WHO IS NOT THE EMPLOYER-IN-FACT IS AN "EMPLOYER" WITHIN THE MEANING OF TITLE VII

Title VII, 42 U.S.C. §2000-e(b) defines employer as: "A person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in a current or preceding calendar year and any agent of such a person." A "person" under 42 U.S.C. §2000-e(a) is: "One or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships,

associations, corporations..."

The problem Petitioner faces in the present case is caused by the absence of a standard for determining whether a governmental subdivision is an employer for purposes of meeting the jurisdictional requirements of Title VII, where the employer-in-fact has less than fifteen employees. The Petitioner charges that the employer-in-fact was the agent of the government subdivision and therefore the principle's employees should be counted to meet the jurisdictional requirements. Courts of Appeals apply no single standard to determine whether a person is an employer where the employer-in-fact has less than fifteen employees.

In reaching its decision that the City of Kansas City, Missouri, was not an employer in the present case, the District Court applied a test used by the National Labor Relations Board (NLRB) to determine whether two business entities constitute a single employer. See Appendix hereto; See Also Trevino v Celanese, 701 F.2d 397, 404 (5th Cir. 1983). The test was adopted by the Eighth Circuit Court of Appeals in Baker v Stuart, 460 F.2d 389, 392 (8th Cir. 1977). The four pronged test considers: (1) interrelation of operations between the two entities; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. The test is referred to as the "Single Employer Theory." B.

Schlei & P. Grossman, Employment Discrimination Law (2nd Ed. 1983) at 1000.

The single employer theory in NLRB cases has generally been applied only to business entities such as business employers and labor organizations because political subdivisions are not employers for purposes of the Labor Management Relations Act. See Ayres v International Broth. of Elec. Workers, 666 F.2d 441 (9th Cir. 1982). The differences in the nature, structure and purpose of a political subdivision and a business entity require a standard individual to each. A test designed to determine whether the interrelations of two business operations give the two a single identity, would be inappropriate for a

political subdivision since, for instance, there is no idea of common ownership in a political subdivision. See also Appendix 1 hereto, dissenting opinion to the Eighth Circuit Court of Appeals decision.

According to Schlei & Grossman, different theories, though overlapping, may be used to determine whether an entity which is not the employer-in-fact is an employer within the meaning of Title VII: (1) the Single Employer Theory; (2) the Joint Employer Theory; (3) the Agent Theory; and (4) Special Application of Integrated Enterprise Theory to Employer Associations. Id.

The Single Employer Theory allows "...separate business entities" (emphasis

added) to be "...treated as a single employer for purposes of counting and liability..." Id. The factors considered to determine whether separate entities may be treated as one are those applied in Baker. They are: interrelation of operations; centralized control of labor relations; common management; and common ownership or financial control. Baker, 566 F.2d at 392; Schlei & Grossman at 1000.

The Joint Employer Theory is applied "...to obtain jurisdiction over a company which is unrelated to the employer-in-fact but exercises sufficient day-to-day control over (an employee-in-fact of another company)...so as to become a co-employer..." Id. at 1001. The joint

employer theory is used where "...two companies have different owners and substantially separate operations..." but one company controls the other company's employees. Id. The following are considered in determining whether the two companies are joint employers: control of hiring, discipline or discharge of employees of the employer-in-fact; control of the work schedules and work assignments; or obligation to training or pay such employees. Id. This theory "...recognizes the separate nature of each business..." Id. at 1002. In such a case the EEOC allows the filing of a charge against "a company with fewer than 15 employees where aggregation of the two companies' employees is more than 15 employees." Id. However,

Schlei & Grossman note that no court has passed on the joint employer status absent a finding that the smaller company is an agent of the larger company. Id.

The Agent Theory. Title VII defines employer to include agents of employers. Id.; 42 U.S.C. §2000-e(b). Absent a statutory definition of agent, the common law definition is applied. Schlei & Grossman at 1002. In instances where the agent theory is applied, the employer-in-fact has delegated some of its rights to a third party and the third party may be considered an employer by virtue of the agency relationship allowing the employees to be counted. Id.

Special Application of Integrated-Enterprise Theory to Employer Associations. A special application of the integrated enterprise theory is made in instances where employer associations which have less than 15 employees but own and operate a central hiring hall and control all labor relations policies. Id.

The first three theories have been applied interchangeably by the circuits without regard for the nature, purpose and organization of the charged employer. For example, the single employer theory which was applied in Baker is intended for business entities. See Schlei & Grossman at 1000. In Baker, two charged employers were business entities engaged in the broadcasting business. The

plaintiff contended that though the employer-in-fact did not have the requisite number of employees pursuant to Title VII, plaintiff could maintain the action because Stuart Broadcasting and Grand Island Broadcasting were a single employer. Baker, 566 F.2d at 392. Both companies were owned by the same persons and had the same president who had day to day control of each. Additionally, Stuart Broadcasting provided management services for Grand Island. Id. In applying the elements set out above, the Eighth Circuit concluded that the two companies constituted a single employer for Title VII purposes.

In the present case, the District Court applied the same test which deci-

sion was affirmed by the Eighth Circuit Court of Appeals, though the entities are a governmental subdivision and its agent. The differences in the nature, structure and purpose of a business and a governmental subdivision were not considered in this case.

However, in Dumas v Town of Mount Vernon, Ala., 612 F.2d 974 (5th Cir. 1980), the Fifth Circuit Court of Appeals refused to apply the consolidation doctrine set out in Baker to integrate the town, county and state for purposes of calculating the number of employees.

While Schlei & Grossman admit that the theories propounded may overlap in application, they suggest different em-

ployer relationships to which the single employer theory, joint employer theory and agent theory should be applied. The single employer theory is applied where superfically separate businesses are so integrated in operations as to constitute a single employer. The joint employer theory applies where companies are separate but both exercise day to day control of employees so as to be joint employers. The agent theory can be applied to most potential employer relationships as common law principles of agency are applied to determine whether the smaller employer is the agent of the larger.

Though no overt statement has been made in the reported opinions that common law principles of agency should be

applied where charged employers are governmental or political subdivisions, some courts have actually applied the agent theory in such cases. In Curran v Portland Superintending School Comm., 435 F.Supp. 1063, 1073 (D.Me. 1977), the District Court, which decision was not overturned by the Court of Appeals, determined that though the city was not the plaintiff's employer, the city was sufficiently involved in the employment process because it appropriated funds for salaries, that it must be considered an employer along with the school district. The City of Portland contended that because its city charter prohibited its actual involvement in the administration and management of the school system that it should not be considered

an employer for purposes of meeting the jurisdiction requirements of Title VII. The Court concluded that because the "... authority of the School Committee is limited...by the role of the city in appropriating funds for the support of the public school system, including salaries of personnel," the city was sufficiently involved in the employment process that it must be considered plaintiff's employer for purposes of jurisdiction under Title VII. Id. at 1073.

There, the court did not apply specifically the single employer theory nor the joint employer theory to make its determination. Because of the nature of the organization of the city and the school board and their relationship, the

court made its determination that the city was an employer by virtue of their agency relationship and principally because of the allocation of funds. But see contra Oaks v City of Fairhope, Ala., 515 F.Supp. 1035 (SD Ala. 197__) where the Court determined that though the city allocated funds to the library there was no indicia of control exercised over the library board or its employees. In Oaks, the Court cited the Fifth Circuit's adoption of the Baker test citing cases involving private business enterprises. The Court in Oaks did not apply the test.

Quijano v Univ. Fed. Credit Union, 617 F.2d 129 (5th Cir. 1980) was one of the cited cases in Oaks. In that case the defendant unsuccessfully sought to

claim exclusion from Title VII jurisdiction as a private membership club. The court in no way applied Baker in Quijano. The Court's only reference to Baker was to show authority for its liberal construction of the term "employer". Though the federal courts often cite Baker as authority for their liberal construction of employer, no set standard is applied in the cases.

In Rogero v Noone, 704 F.2d 518 (11th Cir. 1983), plaintiff sued the county tax collector for unlawful discharge in violation of Title VII and 42 U.S.C. § 1983, but failed to name the county as a party defendant. Plaintiff argued that because the tax collector was the agent of the county there was no need to act-

ually name the county in the suit. Id. at 520. The tax collector had less than the required number of employees. Plaintiff urged the court to count all county employees to meet the jurisdictional requirements. Id. at 519.

The Court granted defendant's motion for summary jugment holding that the tax collector was not an employer within the meaning of Title VII. The Court stated that the county was not a party defendant and could not be counted for jurisdictional purposes. Id.

Though the issue on appeal in Rogero differs from that in the present case, the concurring opinion by Justice Clark in that case addresses directly those

factors to be considered when determining whether an agency relationship exists between a governmental entity and another entity. Id. at 522. Justice Clark concurred with the decision to grant the motion for summary judgment because he concluded that the tax collector was not an agent of the city. Id. In considering whether the agency relationship existed, Justice Clark considered the following: (1) Whether the principal has supervisory control over the agent (considering pay, hours, benefits, fixed by the employer rather than the agent); (2) Source of funds; (3) Whether the principal and agent have a common pension fund; and (4) Whether there is a common civil service and grievance policy.

Justice Clark additionally suggested that the laws of the state or locale must be examined to determine the relationship between the political subdivision and its relationship to other entities. Id. at 522. In the concurring opinion, Justice Clark examined the legislative prescription that the Department of Revenue supervise the tax collector's office. Pursuant to Title XIII, Taxation and Finance, 192 et. seq. Fla. Stat. (1975) and 195.002 et seq., (1975), the Revenue Department of the State of Florida regulated the tax collectors' offices and no authority eminated from the county. An attorney general's opinion also showed the lack of authority of the county to regulate the tax collector's office.

There common law principles of agency were applied to determine whether the tax collector was an agent of the county. There was no application of the single employer theory nor the joint employer theory by the Eleventh Circuit as was the case with the Fifth and Eighth Circuits though in each case the task was to determine whether a smaller employer and a larger employer should be consolidated for counting purposes.

In a suit for sex discrimination in employment, Spirt v Teachers Ins. and Annuity Assoc., 691 F.2d 1054 (2nd Cir. 1982), the Second Circuit Court of Appeals, quoting Vanguard Justice Society Inc. v Hughes, 471 F.Supp. 670, 696, (D. Md. 1979), said, "...(I)t is gener-

ally recognized that the term employer, as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access to any individual to employment opportunities, regardless of whether that party may technically be discribed as an employer of an aggrieved individual as that term has generally been defined at common law." 691 F.2d at 1063. Neither the Court in Spirt nor Vanguard applied the theories listed herein. Instead, the test used by these courts was whether the charged employers significantly affected the plaintiff's access to employment.

2. THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS CONCERNING THE CHOICE OF A THEORY COURTS APPLY TO DETERMINE WHETHER AN ENTITY IS AN EMPLOYER WITHIN THE MEANING OF TITLE VII

Several theories may be applied to determine whether an employer who is not the employer-in-fact should be consolidated with a smaller employer to meet the 15 employees requirement of Title VII. But because of the different kinds of employers covered by the Act, no set standard should be applied to all employers. To provide uniformity in the treatment of plaintiffs and defendants on the issue of who is an employer within the meaning of Title VII, there is a need to designate a standard or theory to be ap-

plied when facing the issue of consolidation depending on the type employer involved, whether a private business enterprise or a governmental or political subdivision. Since the Circuits have applied different theories to resolve the same problems, and have, in some instances, reached conflicting conclusions on virtually the same factual situations, a uniform standard would be equitable.

3. WHETHER THE TEST APPLIED IN DETERMINING THE RELATIONSHIP BETWEEN TWO PRIVATE ENTITIES AS AN EMPLOYER IS APPLICABLE WHEN A GOVERNMENT SUBDIVISION IS AN ALLEGED EMPLOYER

This Court's attention is directed to the strong dissenting opinion expressed

by the Chief Justice of the Eighth Circuit Court of Appeals, holding that the test applied in Baker, supra, would not be applicable to the factual situation here concerning governmental agencies. We therefore incorporate by reference the dissenting opinion of the Eighth Circuit Court of Appeals in support of this particular issue. See also Owens v Rush, 636 F.2d 283 (10th Cir. 1980).

4. WHETHER THE TRIAL COURT ERRED IN SUSTAINING THE CITY OF KANSAS CITY, MISSOURI'S MOTION FOR DIRECTED VERDICT AGAINST PETITIONER'S CLAIM OF SEX DISCRIMINATION ASSERTED UNDER 42 U.S.C. §1983

Petitioner, in support of her argument hereunder relies upon the cases of Monell v N.Y. City Department of Social Service, 486 U.S. 658 (1978) and Owens v City of Independence, Missouri, 445 U.S. 662 (1980). The federal District Court for the District of Missouri rationalized its decision in sustaining Respondent, City of Kansas City, Missouri's motion for directed verdict in reference to Petitioner's §1983 claim that there was no showing of official policy of exclusion of females from the position of Director of Emergency Assistance, Inc. The evidence relating to the statement of Mr. Jackson clearly establishes the fact that a male was more suitable for the position rather than a female. This evidence coupled with other

evidence clearly establishes a clear cut policy and the undisputed evidence clearly established that Emergency Assistance, Inc. at no time employed a female in the position of Director.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1743

PAULETTE THOMPSON MASSEY,

Appellant

v.

EMERGENCY ASSISTANCE, INC.
and CITY OF KANSAS CITY,
MISSOURI, A Municipal
Corporation,

Appellees.

Submitted: November 30, 1983

Filed: January 11, 1984

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge

PER CURIAM

Paulette Thompson Massey brought an action against the City of Kansas City, Missouri and Emergency Assistance, Inc. alleging sex discrimination in violation

of Title VII of the Civil Rights Act, 42 U.S.C. §2000 et seq., and 42 U.S.C. § 1983. Massey appeals from the district court's decision directing a verdict for appellees on the §1983 claim and dismissing the Title VII claim for lack of subject matter jurisdiction.

The district court, in a lengthy examination of the facts, applied the test announced in Baker v Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977), and concluded that, for purposes of the Title VII action, Kansas City and Emergency Assistance, Inc. could not be treated as a single entity or joint employer nor could Emergency Assistance be considered the City's agent. On the §1983 claim, the court concluded there was no showing

of any "policy or custom" on the part of the City which would make it liable as a municipality.[1] Since we discern no error of law and the findings of fact are not clearly erroneous, we affirm on the basis of the district court's opinion.

Affirmed. See Eighth Circuit Rule 14.

[1] Appellant voluntarily dismissed her § 1983 claim against Emergency Assistance, Inc. Thus, we are not confronted with the question whether for purposes of the fourteenth amendment Emergency Assistance's alleged mistreatment of Massey constituted "state action." See McVarish v Mid-Nebraska Com. Mental Health Center, 696 F.2d 69 (8th Cir. 1982) (dismissal of employee of community mental health center was state action for fourteenth amendment purposes). We, therefore, express no opinion as to whether Massey had a valid §1983 cause of action against Emergency Assistance, Inc.

LAY, Chief Judge, dissenting.

I respectfully dissent. The issue is whether Emergency Assistance employed a sufficient number of persons for it to be considered an employer for purposes of Title VII. See 42 U.S.C. §2000e(b) (fifteen employees required). The district court held that under the test of Baker v Stuart Broadcasting Co., 560 F. 2d 389 (8th Cir. 1977), the City and Emergency Assistance should not be considered as a single entity for the purposes of Title VII. The court also stated that no principal-agent relationship existed between Emergency Assistance and CDA. I submit that the majority's approval of the district court's application of the Baker test

is incorrect. Alternatively, I would hold that Emergency Assistance was the agent of the City of Kansas City and that the district court's finding to the contrary was clearly erroneous.

Emergency Assistance was a private, non-profit corporation created to provide emergency relief for the City's needy. Emergency Assistance was under contract with a city agency, known as CDA, to carry out this program. CDA reimbursed Emergency Assistance for its expenditures, both administrative and distributional, from funds received by the City under the Model Cities Program ("Demonstration Cities and Metropolitan Development Act of 1966," 42 U.S.C. §§ 3301-3374 (1976 & Supp. V 1981)). Pursuant to this contract, Emergency Assist-

ance was required to file with CDA a monthly report concerning Emergency Assistance's activities. At the outset of the program, and occasionally thereafter, the City or CDA gave training to Emergency Assistance employees on how to interview applicants and evaluate their requests.

Emergency Assistance was governed by a board of directors. The Mayor of the City designated the persons who would make up the Board of Directors.[2] In

[2] The district court stated that the Mayor's designation of Emergency Assistance's Board of Directors appeared largely an "exercise in formality." Evidently, the residents of an area to be served by Emergency Assistance would recommend persons for positions on the Board. However, the district court made no findings as to how many of the persons recommended by residents actually served on the Board or what percentage of the Board were recommended by this process.

respect to employee relations, the HUD guidelines under which CDA acted were incorporated into the contract between CDA and Emergency Assistance. These guidelines required Emergency Assistance to submit job descriptions to CDA and to advertise with and request referrals from CDA. In addition, Emergency Assistance was obligated to report each month to CDA on employee status, notify CDA of any suspension or termination of personnel, and permit CDA to attempt conciliation with respect to employee disputes.

The district court found that the City had no control over Emergency Assistance except to the extent that Emergency Assistance was required to operate within its contractual guidelines. I find this analysis cleary erroneous.

First, I find the district court erroneously applied the Baker test. I think it clear such test is not applicable to a factual situation concerning governmental entities. Baker involved a Title VII action against two broadcasting companies. One company directly employed the plaintiff and the other company provided managerial services to the plaintiff's employer. Plaintiff contended that the two companies should be considered her joint employers. The district court found that the companies were completely separate and that, therefore, they should not be consolidated for Title VII purposes. This court held that the proper standard to be used was that created by the National Labor Relations Board (NLRB) in actions under the National Labor Relations Act. That test

focuses on four factors: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. Baker, 560 F.2d at 392.

While this test has been used by courts in determining common control between two private entities, many courts have been reluctant to employ this standard when a governmental subdivision is an alleged employer. See, e.g., Trevino v. Celanese Corp., 701 F.2d 397, 404 n. 10 (5th Cir. 1983) ("As articulated, the standard is not readily applicable to governmental subdivisions..."); Owens v. Rush, 636 F.2d 283, 286 n.2 (10th Cir. 1980) (emphasis original) (the Baker

test was "developed by the National Labor Relations Board to determine whether consolidation of separate private corporations is proper."); cf. Rogero v. Noone, 704 F.2d 518, 521 n.5 (11th Cir. 1983) ("We do not question that a sheriff or a tax collector can be an agent of the governing authority of the political subdivision that employs him...").

Factors such as "common ownership or financial control" and "centralized control of labor relations" are not relevant in analyzing the contractual relation of a town or county to a company or individual. There is no notion of "ownership" or "financial control" of a business by a city or county as there is with a subsidiary and its parent corporation.

A city does not own stock in the companies with which it works. Similarly, a city does not bargain with and give benefits to the employees, as a group, of all the entities the city contracts with to carry out its municipal functions. The test of Baker is appropriate for determining joint control between private companies; it is not relevant to the situation presented in this case.

The test that is appropriate is a basic agency analysis. The district court's inquiry should have centered on whether the City exerts a degree of control over Emergency Assistance such that Emergency Assistance should be considered the agent of the City. The district court focused on the Baker test, and

did not explicitly analyze the relevant facts under an agency relationship. In Southern Pacific Transportation Co. v. Continental Shippers Association, Inc., 642 F.2d 236 (8th Cir. 1981), we observed:

> Agency is a legal concept that depends upon the existence of certain factual elements: (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking.

Id. at 238.

Under this analysis, I think the facts as found by the district court, require this court to hold that an agency relationship between Emergency Assistance and the City existed. As found by the district court, Emergency Assistance was created to act for the City. The contractual relationship of Emergency Assistance and the City (acting through CDA) manifests both the City's intent that Emergency Assistance act for it and Emergency Assistance's "acceptance of the undertaking." The district court's findings provide abundant evidence of the third factor -- an understanding between the parties that the principal is to be in control. A persuasive indicim of this control is the Mayor's power to appoint the Board of Directors to Emer-

gency Assistance. Other indicia of the agency relationship is the requirement that Emergency Assistance file monthly reports with CDA describing its activities and the basic requirement that CDA be involved in virtually every important phase of Emergency Assistance's employment practices.

I would reverse and remand the case to the district court with directions that Emergency Assistance be considered an employer under Title VII.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

PAULETTE THOMPSON MASSEY,	)	
	)	
Plaintiff	)	No. 80-0785-CV-W-0
vs.	)	
	)	
EMERGENCY ASSISTANCE, INC. et al.,	)	
	)	
Defendants)		

MEMORANDUM OPINION
AND JUDGMENT

This is a civil rights action brought pursuant to Title VII of the 1964 Civil Rights Act (42 U.S.C. Section 2000, et seq) and Section 1 of the Ku Klux Act of 1971 (42 U.S.C. Section 1983), wherein plaintiff alleges employment discrimin-

ation based upon sex. Two defendants are named: the City of Kansas City, Missouri ("the City"), a municipal corporation; and Emergency Assistance, Inc. ("Emergency Assistance"), a Missouri not-for-profit corporation organized for the purpose of providing emergency monetary assistance to the poor.

Plaintiff claims that, because of her sex and in retaliation for earlier complaints of sexual discrimination which she filed with the Equal Employment Opportunity Commission, defendant Emergency Assistance denied her a promotion to the position of its Executive Director, and later terminated her employment. The Title VII claim against Emergency Assistance is self explanatory; the 1983

claim against Emergency Assistance rests upon the assertion that in so acting Emergency Assistance was operating "under color of state law". The Title VII claim against the City is based on the theory that the relationship between the City and Emergency Assistance was such that the City should either be considered plaintiff's actual employer, or that Emergency Assistance was acting as the City's agent, while the 1983 claim against defendant City is predicated upon the theory that it was responsible for the alleged discriminatory acts.

The matter was tried to a jury on the 1983 allegations, and to the Court on the Title VII allegations. At the close of plaintiff's evidence the Court dir-

ected a verdict on behalf of defendant City with respect to the 1983 claim - a ruling confirmed hereinbelow - and plaintiff thereupon voluntarily dismissed, with prejudice, her 1983 claim as to defendant Emergency Assistance. The jury was discharged and trial to the Court was competed on the Title VII issue alone. I now render my findings of fact, conclusions of law and judgment in the matter, pursuant to Rule 52, Federal Rules of Civil Procedure.

I.
CLAIM AGAINST DEFENDANT KANSAS CITY UNDER 42 U.S.C. SECTION 1983

The basis of my action in directing a verdict on behalf of defendant City with respect to plaintiff's 1983 claims is,

I believe, fully articulated in the record. For present purposes it will suffice to say that not only was no action by any officer, agent or employee of defendant City shown to be causally related to the matters of which plaintiff complaints; there was, in addition, no showing of any "policy or custom" on the part of the City which was implicated in those matters. That failure of proof is fatal to plaintiff's 1983 claim insofar as the lability of a municipal or other local governmental body is concerned. Monell v New York City Dept. of Soc. Serv., 486 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

II.
CLAIM AGAINST BOTH DEFENDANTS UNDER TITLE II

There is a threshhold problem in connection with plaintiff's Title VII claim. The proof in the case clearly shows that defendant Emergency Assistance itself never employed more than 10 persons at any given time. That was the testimony of plaintiff, herself; and it was verified by the testimony of Mr. Curry and in part by defendants' Exhibit #1 (an Employer Contribution and Wage Report filed by Emergency Assistance with the State of Missouri). The problem arises because Section 2000e(b), in its definition of "employer", limits Title VII's applicability to those who have

> "...fifteen or more employees for each working day in each of

twenty or more calendar weeks in the current or preceding year, and any agent of such a person." (emphasis added).

This in turn implicates the Court's subject matter jurisdiction over the claim. Bonomo v. National Duckpin Bowling Congress, Inc., 469 F.Supp. 467, 470 (D. Md. 1979).

In an effort to surmount this hurdle, plaintiff argues that the relationship between the City - which is conceded to have had more than 15 employees at all relevant times - and Emergency Assistance was such that either the two entities should be considered as one for these purposes, or that Emergency Assist-

ance was an "agent" of the City within the meaning of 2000e(b). Given the proof before me, I feel both those arguments must be rejected; and I conclude, accordingly, that the Court is without subject matter jurisdiction over plaintiff's Title VII claim.

As to plaintiff's suggestion that Emergency Assistance and the City should be considered a "joint employer" or single entity for these purposes, the test to be applied is that announced by the Eighth Circuit in Baker v. Stuart Broadcasting Co., 560 F.2d 389, 392 (8th Cir. 1977). According to that decision, four elements or factors must be considered: (1) the degree of interrelation between the City's operations and those of Emer-

gency Assistance; (2) the degree of common management of the two entities; (3) the degree of centralized control of labor relations as between the two entities; and (4) the degree of common ownership or financial control of the two entities. As indicated in Baker, these four factors must all be considered; no one alone is controlling.

In connection with these matters, I find the following facts (separated as between each said element, although obviously there may be some overlap):

(1) Interrelation of Operations (a) At some point in time prior to 1971, the City formed an agency known as the CDA, for the purpose of receiving funds from the federal government under what was

commonly known as the Model Cities Program ("Demonstration Cities and Metropolitan Development Program," 42 U.S.C. Section 3301 et seq). Emergency Assistance was created as a private, not-for-profit corporation under Missouri law, in or about the year of 1971, for the purpose of providing emergency monetary assistance to the poor, utilizing Model Cities Program funds which would be made available through the CDA.

(b) The mechanism used to effect the foregoing was a contract between the CDA and Emergency Assistance, whereby Emergency Assistance agreed to operate a program of emergency (short term) relief for the needy, under guidelines promulgated by the CDA pursuant to HUD guide-

lines and requirements, and the CDA agreed to reimburse Emergency Assistance for its expenditures (apparently both administrative and distributional), using funds received from HUD under the Model Cities Program. None of the contracts between the CDA and Emergency Assistance (apparently, over the years, there were several) were offered in evidence.

(c) In operation, Emergency Assistance Staff personnel would interview and screen applicants for assistance, make a determination as to their eligibility and needs, and distribute funds to them or to creditors on their behalf. Reimbursement would then be made to Emergency Assistance by the CDA.

(d) The persons employed by Emergency Assistance, of whom plaintiff was one, were involved on a daily basis in interviewing applicants, investigating their needs, making decisions as to their eligibility and requirements, preparing documentation with respect to the same, and distributing funds. These activities, which comprised the whole function of Emergency Assistance, were carried on entirely by Emergency Assistance personnel. Emergency Assistance maintained its own bank account, drew checks for its necessary expenditures thereon, which were signed by Emergency Assistance personnel, and maintained its own offices (which were not associated with any City offices). Pursuant to its contract, Emergency Assistance was to file with

the CDA, on a monthly basis, a report concerning its activities.

(e) From time to time the City or the CDA provided certain technical aid to Emergency Assistance in explaining the HUD guidelines; and at the outset of the program at least, and apparently occasionally thereafter, gave training to Emergency Assistance employees in how to interview applicants and evaluate their requests. In addition, at least some of the original employees hired by Emergency Assistance obtained their application forms at City Hall, and returned them there, although there is no indication that City or CDA officials participated in the hiring process. This latter practice apparently was in-

dulged in purely as a matter of convenience until such time as Emergency Assistance acquired its own offices; at least there is no evidence that it continued for any appreciable period of time. The evidence does not reflect any other or further actual assistance by the City or CDA in the working operations of Emergency Assistance.

(f) The City was, of course, engaged on a daily basis in all the ordinary and multitudinous activities of a metropolitan city government. There is no evidence, however, that the City, itself, had ever maintained a program of providing emergency funds to the needy. The sole function of Emergency Assistance was to administer such a program; neither

it nor its employees had any part of any kind to play in the ordinary functioning of city government.

(2) Common Management. (a) The City was governed by its City Council and Mayor - and, of course, in the final analysis, by its resident voters. The governing body of Emergency Assistance was its Board of Directors, all private citizens except for one City employee who sat as an "ex-officio," non-voting member of the board. None of the Emergency Assistance directors were City Council members. Emergency Assistance personnel answered to the Emergency Assistance staff, who in turn were responsible to its Executive Director, who in turn was responsible to the Emergency

Assistance Board of Directors. The board was fully autonomous.

(b) The Mayor of the City designated the persons who would make up the Board of Directors of Emergency Assistance. It appears, however, that this was largely an exercise in formality, since the recommendations for board positions were made by the residents of the areas to be served, and since the Mayor was apparently chosen to exercise this function simply by virtue of his titular position rather than in the performance of any City duties, as such. There is no eivdence that the Mayor (or for that matter any other person connected with the City) ever attempted to exert any control over the board members, or that the board mem-

bers were, or were considered to be, accountable to the Mayor.

(3) Centralized Control of Labor Relations. (a) Pursuant to its contract with the CDA, Emergency Assistance was required to observe certain HUD sponsored guidelines in respect of its employee relations. As paraphrased and synthesized from Plaintiff's Exhibit # 14 (CDA guidelines, which were incorporated by reference into the contract with Emergency Assistance), those guidelines required the following of Emergency Assistance: that it submit a job description for each employment position detailing the duties, minimum qualifications and salary range therefor; that it register any employment vacancies with the

CDA, advertise and interview simultaneously with the CDA for those positions (apparently so that the CDA could maintain a "job bank" list of all potential employees for all Model Cities programs), and request referrals of qualified applicants from the CDA's "job bank"; that it obtain approval from the CDA, based upon justification, for hiring an employee who was not an "MN (model neighborhood - the target areas to be served by the program) resident; that it submit a monthly report to the CDA on employee status, including salary changes; that it submit a monthly report to the CDA on job applicants who were referred to it (Emergency Assistance); that it adopt a plan of salary and wage

administration;[1] that it prohibit an employee from occupying a conflicting job position; that it provide a specified amount of "release time" for employees who were pursuing "career development training" and provide for pay increases for those who successfully completed such training; that it establish "a suitable procedure for handling disciplinary actions and grievances"; that it notify the CDA of any suspension or termination of personnel; that it provide a right of

[1] Which would schedule a salary range for all positions, require that any recommendation for a salary increase be based on an evaluation report; prohibit any more than one "step" (5% of base salary) in salary increase at a time or any more than one increase per year; include a cost of living adjustment feature; and require that any merit increase be supported by a written statement from the employee's immediate supervisor.

appeal to the "Model Cities Board of Appeal and Review" in connection with employee disputes (see infra 3.(b)); and that it permit the CDA to attempt conciliation with respect to any employee disputes.

(b) As indicated, Emergency Assistance employees were to be permitted to appeal adverse decisions respecting themselves to a "Board of Appeal and Review." The make-up of that body is mentioned in Plaintiff's Exhibit #14; its authority and potential relationship to the City is addressed in Defendant's Exhibit #16, a memorandum authored by an Assistant City Attorney. It appears that the Board was comprised of an "NPG" (Neighborhood Planning Group) represen-

tative (so far as I can determine, an NPG was a private body rather than a City agency, and presumably the "representative" would be a private citizen), a member of the "O/A" (Operating Agency) (in this case Emergency Assistance), and a third person selected by those two. The source and perimeters of the Board's authority, and the Board's relationship to the City, if any, is unclear, but from its general function and makeup I conclude that it was not, as such, an arm of any City agency (including the CDA), and that it functioned autonomously of both the City and entities such as Emergency Assistance. As noted, the right to such an appeal was contractual in nature rather than something mandated by an statute or City ordinance.

(c) Within the guidelines which it was contractually obligated to observe, Emergency Assistance had, and exercised, complete authority to hire, fire and discipline its employees, set their salaries and fringe benefits, determine their positions and duties, allocate their work, establish the hours and conditions of their labor, and control and direct their activities. Except insofar as it had required a contractual commitment to the guidelines mentioned above, the City (including the CDA) had no authority to interfere in or manage such matters, and did not attempt to do so.

(d) The City and its own employees were governed by whatever collective bargaining agreements or other arrangements

(including the requirements of state statute and city ordinance) existed between them. What those might have been is entirely unaddressed by the evidence; but there is no indication in the record that those agreements or arrangements governed or pertained in any way to the guidelines in the contract with Emergency Assistance, or to Emergency Assistance employees.

4. Common Ownership or Financial Control

(a) There was no common ownership as between the City and Emergency Assistance. The City is a municipal corporation. Emergency Assistance was an entirely private not-for-profit corporation. Emergency Assistance was not an agency of the City.

(b) The City, through the CDA, functioned as a conduit for the funds with which Emergency Assistance operated. So far as the record shows, Emergency Assistance had no self-generated funds of its own. The City did not, however, have a free hand with respect to funding for Emergency Assistance. The relationship between the CDA and Emergency Assistance was contractual, and as far as I can determine, so long as Emergency Assistance met its contractual obligations the CDA was obligated to furnish the funds contractually agreed to.

In analyzing the above mentioned four elements in connection with these facts, I conclude that the resulting picture

is not such as to permit the City and Emergency Assistance to be treated as a single entity or joint employer for present purposes. As concerns the first factor or element, any real interrelationship between the City's operations and those of Emergency Assistance was relatively minimal. It is undoubtedly true, as an abstract proposition, that the City might have engaged directly in the distribution of emergency funds to the needy, had it chosen to do so. And it is also true that the CDA was established by the City for the purpose of receiving funds for this purpose (and others) from HUD and in turn channeling some of those funds to Emergency Assistance for ultimate distribution to the poor. I do not, however, consider the simple fact that a private entity is

engaged in a function which might also have been properly performed by a governmental entity to be of any particular significance. To hold otherwise would be to suggest an operating relationship between local government and a great many private charitable, civic, educational, cultural or scientific enterprises, including the United Way, museums, art galleries, private schools and other things. Nor do I find the general existence of a contractual relationship between the CDA and Emergency Assistance in respect of such a function to be of any great significance, as such, since a municipal corporation may certainly contract with a private party for the performance of some project which the city itself might have performed, had it

chosen (as in paving streets, digging sewers or erecting buildings), without the employees of that private party being considered employees of the City. Accordingly, so far as the particular element under consideration here is concerned, one must look beyond the surface and focus upon the degree to which the City or its employees were in fact determined above, I can only conclude that such involvement was minimal even on a general basis, and practically non-existent on a day-to-day basis.

As to the second element mentioned, it is clear that there was no element of "common management" as between the City (or the CDA) and Emergency Assistance. One was a municipal corporation; the

other a private entity. Each controlled itself. The use of the City's Mayor as a functionary to designate the Emergency Assistance board members does not detract appreciably, if at all, from that fact, since there is no indication whatsoever that any element of control over Emergency Assistance ever resulted therefrom.

The third factor mentioned concerns "centralized control of labor relations." In the labor law field from which it is drawn, this phrase has reference to the existence, or lack thereof, of a single source which controls or has the authority to control various labor related matters, such as hiring and firing of employees, wage scales and conditions

of work, for two or more nominally distinct entitles. As applied in the context of this case, it would require a finding that the City either made, or had the authority to make, decisions of that nature both for its own employees and for those of Emergency Assistance. I am unable to reach such a conclusion. It is true that the contract between the CDA and Emergency Assistance incorporated rather pervasive and detailed guidelines, or outlines, within which Emergency Assistance was obliged to operate in its employee relations. These obligations, however, were the product of a contractual relationship, and the City (including the CDA) had no unilateral ability to change them as it might see fit, or to exert control beyond them.

And, as a reference to the findings made above will indicate, within those guidelines Emergency Assistance in fact exercised complete control over its employee relations, without interference by the City. In these circumstances, the general nature of the relationship between Emergency Assistance and the City, in respect of management of employee relations, seems somewhat analogous to the relationship between a union contractor and non union subcontractor in situations where the contract between the two requires the subcontractor to hire only union members or to observe certain other features of the union contract. This does not by itself create a "joint employer" relationship for federal labor lab purposes. Metropolitan Detroit, Etc.

v. J.E. Hoetger & Co., 672 F.2d 580, 584-85 (6th Cir. 1982).

Much the same sort of analysis may be applied with respect to the element of common ownership or financial control. It is clear that there is no common ownership. The City was (through the CDA) the immediate source of the HUD originated funds upon which Emergency Assistance depended; but the matter was contractual, presumable binding both parties. There is nothing in the record to suggest that the City had any unilateral ability to alter or eliminate that funding so long as Emergency Assistance met its obligations and HUD continued to supply Model Cities funds which could be allocated for this purpose.

The strongest point in plaintiff's favor is found in the extensive guidelines which the City required Emergency Assistance to follow in its employee relations; although as pointed out, those guidelines do not by any means equate to true "joint" control by the City over both its own labor relations and those of Emergency Assistance. As noted previously, however, no one of the four elements is controlling; all must be viewed together. Baker v Stuart Broadcasting, supra. When that is done, the picture which emerges depicts, at best, two separate and distinct entities whose only real relationship was contractual. The contract did restrict Emergency Assistance, primarily in its employee relations, to performance within certain

guidelines established therein, but the effect of those was not so all-pervasive as to destroy the essentially separate identity of the two entities, or by itself to justify treating the City as the joint employer of the employees of both. As the Eighth Circuit stated in Pulitzer Publishing Co. v. N.L.R.B., 618 F.2d 1275, 1280 (8th Cir. 1980), cert. den. 449 U.S. 875 (1980), "even a very substantial qualitative degree of centralized control of labor relations does not in itself determine the joint employer issue." In these circumstances, and given my findings with respect to the other three elements, I conclude that a "joint employer" or single entity relationship has not been shown. Compare International House v N.L.R.B. 676, F.2d 906, 912-15 (2d Cir. 1982).

I reach a similar result with respect to plaintiff's alternative assertion that Emergency Assistance should be considered as the City's agent for present purposes. While an agency relationship would represent a theoretically separate basis for joint treatment of the employees of both entities for Title VII jurisdictional purposes, see e.g. Mas Marques v. Digital Equip. Corp., 490 F. Supp. 56, 58 (D. Mass. 1980); Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181, 1184 (E.D. N.Y. 1979), the facts I have noted above clearly preclude any application of that theory here. The proof required in this respect would be the same as that involved in establishing a principal/agent relationship in any other context - a showing, by a pre-

ponderance of the evidence, that the alleged agent (here Emergency Assistance) was acting on behalf of and was subject to the control of the alleged principal (here the City). See Restatement (Second) Agency §1 (1958). That is simply not the case with the relationship which has been shown to exist between the City and Emergency Assistance. The City had no "control" over Emergency Assistance except to the extent that the latter was required to operate within its contractual guidelines. Even if that factor could be considered to represent "control" in any sense, it certainly does represent the sort of continuing ability to direct, control, alter and modify another's work which is necessary for an agency relationship.

For all of the foregoing reasons I conclude that the Court lacks subject matter jurisdiction with respect to plaintiff's claims asserted under 42 U.S.C. Section 2000e et seq. Those claims are accordingly hereby dismissed, costs to be born by plaintiff.

At the time it moved for a directed verdict in connection with plaintiff's 1983 claims, the City also moved for an award of prevailing attorney's fees pursuant to 42 U.S.C. Section 1988. Having fully considered that matter, committed by the statute to the Court's discretion, I conclude that the motion should be denied.

IT IS SO ORDERED.

ROSS T. ROBERTS
DISTRICT JUDGE

DATED: April 8, 1983.

(2)

No. 83-1754

In the Supreme Court of the United States

October Term, 1983

PAULETTE THOMPSON MASSEY,
Petitioner,

vs.

EMERGENCY ASSISTANCE, INC.,

and

CITY OF KANSAS CITY, MISSOURI, a municipal corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT KANSAS CITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner, Paulette Thompson Massey, has inaccurately and imprecisely stated the questions presented for review by this Court. The questions presented to the Court for review arise out of the application of the terms "employer" and "any agent of such a person" as contained in 42 USC §2000e (b) which reads, in pertinent part,:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States. . .

The questions arising out of application of these terms are:

1. Can the work force of the Petitioner's employer, Emergency Assistance, Inc., a Missouri not-for-profit corporation, having less than fifteen (15) employees, be combined with the work force of Kansas City, Missouri (admittedly in excess of 15) in order to meet the jurisdictional requirement of 15 employees under 42 USC §2000e (b)? In other words, does the term "employer" permit aggregation of a not-for-profit corporation with a municipal corporation as a single "employer" simply because the municipality funds the not-for-profit corporation as an independent contractor pursuant to a federal grant program long since terminated?

2. Does the term or phrase "any agent of such a person" as used in 42 USC §2000e (b) include independent contractors? In other words, has the statute modified

the common law concept of agency to include independent contractors as agents?

3. Did the trial court clearly err in finding that Emergency Assistance, Inc. was not the agent of Kansas City?

4. Did the District Court and the Court of Appeals clearly err in finding under the test of *Baker v. Stuart Broadcasting Company,* 560 F.2d 389 (8th Cir. 1977) that Emergency Assistance, Inc. and Kansas City should not be found to be a single entity and a single employer pursuant to 42 USC §2000e (b)?

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RESPONDENT KANSAS CITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORTS OF OPINIONS

The opinion of the Court of Appeals is reported at 724 F.2d 690 and the opinion of the Trial Court is reported at 580 F.Supp. 937.

JURISDICTION OF THIS COURT

Jurisdiction of this court to review the judgment of the Court of Appeals is pursuant to 28 USC §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Petitioner would have the Court believe that there is a Fourteenth Amendment issue in this case. The Trial Court heard no evidence supporting such and so this Respondent will not speculate further at this time.

Obviously, interpretation of 42 USC §2000e (b) as to the meaning of "employer" and "any agent of such a person" is at issue in this case, but this case raises no other issues under the Statutes or Constitution of the United States.

STATEMENT OF THE CASE

The Petitioner's statement of the case is somewhat distorted.

This is a Title VII sex discrimination case with the seemingly obligatory §1983 count thrown in. The 42 USC §1983 claim deserves no comment since no evidence was adduced at trial to support it.

The Title VII claim arises on the basis of an unfortunate incident contrived by the Petitioner. The Petitioner was employed as Office Manager, also called Assistant Executive Director, in the office of a Missouri not-for-profit corporation which contracted with Respondent City of Kansas City, Missouri to operate an emergency assistance or public charity program funded by the City with United States Department of Housing and Urban Development (HUD) funds pursuant to Title I of the Demonstration Cities and Metropolitan Development Act of 1966 as a part of the "Model Cities" program. The

corporation never had fifteen (15) employees and thus to assert Title VII jurisdiction EEOC alleged City involvement as "employer" within the meaning of such term in 42 USC §2000e (b).

The corporation was operated by a Board of Directors nominally appointed by the Mayor of Kansas City as a device to achieve public honor and esteem in the elevation of the nominee for director from each of the Model Cities citizen participation organization boards. Each of the seven (7) Model Cities neighborhoods had a citizen participation board chosen in public elections. The Trial Court found that the fact that the Mayor appointed or elevated nominees to the Board of Emergency Assistance, Inc. pursuant to the by-laws of this not-for-profit corporation did not give the City control of that Board. The power of appointment does not give the appointing authority control as this Court well knows since its justices are appointed by the President but not thereby controlled.

After an Executive Director of the Corporation departed, Petitioner applied for the position but was rejected by the Board of Directors composed mostly of women. Afterward the Petitioner approached the Chairman of the Personnel Committee, an elderly male post office employee, asking him why she had not received the appointment. Unfortunately, in a fatherely gesture of consolation to a young woman he made various remarks which did include his statement not precisely recorded but to the effect that the position was not one for a woman. At trial, the gentleman testified that his decision was based upon his assessment of qualifications and that it was not based on sex as he had seemingly indicated in his ill-fated attempt at pacification after the decision had been made. That unfortunate statement by the gentleman is the basis for this case and the totality of the evidence in support

of the Petitioner's position. The Trial Court, of course, did not reach these Title VII factual issues since it found jurisdiction lacking under 42 USC §2000e (b).

Petitioner's statement of the case is inaccurate in not clearly stating that all activities of Emergency Assistance, Inc., at the request of the City, were pursuant to a contract which made the corporation a subcontractor with the City to provide services. The Petitioner's statement at page 15 of the petition for a writ of certiorari that with regard to employment vacancies the corporation and City would "advertise and interview simultaneously" is unsupported by the evidence, somewhat incomprehensible and simply untrue. It is true that at the behest of HUD the contract between the corporation and the City contained many provisions for the benefit of Model Cities neighborhood residents including preferential hiring. HUD imposed fiscal responsibility required provisions to limit wages to no more than for comparable city positions, prohibition of conflicts of interest, anti-kickback provisions etc. as this Court is familiar with in boilerplate for federal grant contracts.

REASONS FOR GRANTING (OR REFUSING) THE WRIT

The Petitioner suggests that the 8th Circuit decision below conflicts with decisions of other Circuits, but in fact such is not true. Respondent will attempt to briefly review cases cited by the Petitioner to refute Petitioner's contention.

Trevino v. Celanese Corporation, 701 F.2d 397 (5th Cir. 1983).

This case involves hiring and promotion between two (2) private corporations with inter-related operations and ownership. This case does not involve combining a City and a not-for-profit corporation as an "employer" under 42 USC §2000e (b). It is not in point as to any issues raised in this case.

Baker v. Stuart Broadcasting Company, 560 F.2d 389 (8th Cir. 1977).

The Respondents urged that the corporation and the City could not be considered joint employers or "employer" under 42 USC §2000e (b) pursuant to *Baker* which required consideration of four elements all of which must be considered and which in this case include (1) the degree of inter-relation between the City's operations and those of Emergency Assistance, Inc., (2) the degree of common management of the two entities, (3) the degree of centralized control of labor relations as between the two entities, and (4) the degree of common ownership or financial control of the two entities. The Trial Court applying the four factor test of *Baker* found that the two entities did not constitute a single "employer" within the meaning of such term in 42 USC §2000e (b).

Ayres v. International Brotherhood of Electrical Workers, 666 F.2d 441 (9th Cir. 1982).

This case states political subdivisions are not "employers" for purposes of the provisions of the Labor Management Relations Act governing suits for violations of contract between employers and labor organizations or between labor organizations. It is irrelevant to the issues raised in this case.

Dumas v. Town of Mount Vernon, Alabama, 612 F.2d 974 (5th Cir. 1980).

This case involved as defendants the Town and its officials. There was no jurisdiction under the Civil Rights Act of 1964 because the town did not have fifteen (15) employees. There was no attempt to aggregate entities as "employer" under 42 USC §2000e (b) in order to achieve the threshold number of 15. This case is not in point as to any issue in this case.

Curran v. Portland Superintending School Committee, etc., 435 F.Supp. 1063 (D.Maine, 1977).

The Court found that the City, School Committee and individual defendants in their capacities as agents all qualified as "employers". This case did not involve aggregating entities to achieve the jurisdictional number of 15 employees. This case is not in point and of course it is a District Court case.

Oaks v. City of Fairhope, Alabama, 515 F.Supp. 1004 (S.D.Alabama, 1981).

In this District Court case, the Court pondered *Baker,* supra, and declined to apply the four factor test of *Baker* stating "whether the Court applies the four *Baker* factors or undertakes a more general factual analysis, the ultimate conclusion is the same—the City of Fairhope and the Library Board are not joint employers." The Court concluded that the City and Library Board established by Alabama law could not be combined to achieve the jurisdictional number of 15 employees under 42 USC

§2000e (b). If this case is in point it supports Respondents' position, but does not indicate a divergence of the Circuits.

It is notable that the court in *Oaks* cited *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) for the proposition that Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. *Oaks,* 515 F.Supp. at 1036.

Quijano v. University Federal Credit Union, 617 F.2d 129 (5th Cir. 1980).

This case is not in point because it does not address combining entities to achieve the jurisdictional number of 15 under 42 USC §2000e (b). This case finds that the Credit Union cannot claim the "private membership club" exception under 42 USC §2000e (b), but it does not address the 15 employee jurisdictional question.

Rogero v. Noone, 704 F.2d 518 (11th Cir. 1983).

In this case, the Plaintiff sued the tax collector in his personal and official capacities. The Putnam County Tax Collection Department had less than 15 employees. The tax collection office was obviously a mere subdivision of the real employer, the County, but for unexplained reasons Plaintiff refused to name the County. This refusal was rewarded by dismissal for failure to meet the jurisdictional number. While this case may support Respondents as to result, it really is not in point.

Spirt v. Teachers Insurance and Annuity Association, 691 F.2d 1054 (2nd Cir. 1982).

In this case, the term "employer" was stretched to cover an insurance association existing to provide insurance and retirement benefits for 40% of colleges nation-

wide. Because the Professor was employed by a college utilizing the association, the association in addition to the college was found to be her "employer" to achieve Title VII jurisdiction as to a sexually discriminatory rate table. While this case may stand for an extraordinary definition of "employer" it does not bear upon the jurisdictional number of 15 employees and Respondent suggests semantic flexibility cannot denigrate the arithmetic specificity of the jurisdictional threshold of 15 employees without savaging the language and the intent of Congress. This case simply is not in point.

Vanguard Justice Society, Inc. v. Hughes, 471 F.Supp. 670 (D.Maryland, 1979).

In this case the Court concluded that the term "employer" was broad enough to include the City of Baltimore, the Baltimore Civil Service Commission and the Baltimore Police Department. This Respondent suggests that this case is not in point.

PETITIONER'S CONCERN WITH THE DISSENTING OPINION OF THE COURT OF APPEALS

The dissenting opinion of the Court of Appeals in this case is interesting. The majority adopts the opinion of the Trial Court while the dissenting opinion would reverse the Trial Court with regard to application of the four factor test in *Baker* at 560 F.2d 392. The dissenter while approving *Baker* would limit its application to private companies and would not adapt *Baker* for application to any case involving a governmental entity. The dissenter would also ". . . hold that Emergency Assistance was the agent of the City of Kansas City and that the District Court's finding to the contrary was clearly erroneous.", *Massey,* 724 F.2d at 691. The dissenter is im-

pressed by the grant contract's requirements and conditions which he apparently believes give a degree of control indicative to him of agency although the fact finder at trial ruled otherwise. The dissenter goes on to state "a persuasive indicium of this control is the Mayor's power to appoint the Board of Directors of Emergency Assistance. Other indicia of the agency relationship are the requirement that Emergency Assistance file monthly reports with the CDA describing its activities and the basic requirement that the CDA be involved in virtually every important phase of Emergency Assistance's employment practices." *Massey,* 724 F.2d at 693. At trial the court did not find that an agency relationship existed. The dissenter seems impressed by the Mayor's proforma power of appointment although the trial court was not impressed. This Respondent suggests that the dissenter is confusing the Mayor's proforma power of appointment with the power to discharge, which is solely with the corporation's Board of Directors. The power of appointment should not be confused with the power to hire and fire which certainly is an indicia of control.

PETITIONER QUESTIONS WHETHER THE TRIAL COURT ERRED IN SUSTAINING THE CITY'S MOTION FOR DIRECTED VERDICT AGAINST PETITIONER'S CLAIM OF SEX DISCRIMINATION ASSERTED UNDER 42 USC §1983

The Trial Court sustained the City's Motion for a directed verdict because it heard no evidence of any action by any officer, agent or employee of Defendant City shown to be causally related to the matters of which Plaintiff complains and no showing of any "policy or custom" on the part of the City which was implicated in any alleged discrimination. In so ruling, a Court relied upon *Monell*

v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). With regard to the questionable 1983 claim against the not-for-profit corporation, at page 12 of Petitioner's Petition for Writ of Certiorari Petitioner states, "Petitioner voluntarily dismissed her Section 1983 claim against Emergency Assistance, Inc., because at the time of trial, Emergency Assistance, Inc. became defunct without no assets." After that voluntary dismissal, the jury was discharged and the remainder of the trial was to the court on the Title VII count.

CONCLUSION

The Writ of Certiorari should not be issued because the Petitioner has failed to document any diversity of opinion between the Circuits with regard to the issues of this case and the Petitioner has failed to demonstrate any clear error in the courts below.

Respectfully submitted,

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(3)

No. 83-1754

In the Supreme Court of the United States

October Term, 1983

PAULETTE THOMPSON MASSEY,
Petitioner,

vs.

EMERGENCY ASSISTANCE, INC.,

and

CITY OF KANSAS CITY, MISSOURI, a municipal corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT EMERGENCY ASSISTANCE, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether there was a sufficient nexus between the City of Kansas City, Missouri, and Petitioner's employer-in-fact, Emergency Assistance, Inc., which would constitute Emergency Assistance, Inc. and the City of Kansas City, Missouri as Petitioner's employer, cognizable under Sec. 704a, Title VII, 42 U.S.C. Sec. 2000e, pursuant to either the single employer theory or the joint employer theory?

2. Does the term or phrase "any agent of such a person" as used in 42 U.S.C. Section 2000e(b) include independent contractors? In other words, has the statute modified the common law concept of agency to include independent contractors as agents?

3. Did the trial court clearly err in finding that Emergency Assistance, Inc. was not the agent of Kansas City?

4. Did the District Court and the Court of Appeals clearly err by applying the test of *Baker v. Stuart Broadcasting Company,* 560 F.2d 389 (8th Cir. 1977) and by subsequently finding that Emergency Assistance, Inc. and Kansas City should not be found to be Petitioner's employer pursuant to 42 U.S.C. Section 2000e(b) under either the single employer theory or the joint employer theory?

5. Did the trial court clearly err in sustaining the City of Kansas City, Misscuri's Motion for Directed Verdict against Petitioner's claim for sex discrimination asserted under 42 U.S.C. Section 1983?

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REFERENCE TO REPORTS OF OPINIONS

The opinion of the Court of Appeals is reported at 724 F.2d 690 and the opinion of the Trial Court is reported at 580 F. Supp. 937.

JURISDICTION OF THIS COURT

Jurisdiction of this court to review the judgment of the Court of Appeals is pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Petitioner would have the Court believe that there is a Fourteenth Amendment issue in this case. The Trial Court heard no evidence supporting such and so this Respondent will not speculate further.

Obviously, interpretation of 42 U.S.C. Section 2000e(b) as to the meaning of "employer" and "any agent of such a person" is at issue in this case, but this case raises no other issues under the Statutes or Constitution of the United States.

STATEMENT OF THE CASE

This is a civil rights action brought pursuant to Title VII of the 1964 Civil Rights Act (42 U.S.C. 2000, *et seq.*) and Section 1 of the Ku Klux Klan Act of 1871 (42 U.S.C. Section 1983). The matter was tried to a jury on the Section 1983 allegations and to the Court on the Title VII allegations. At the close of Petitioner's evidence the Court directed a verdict on behalf of respondent, City of Kansas City, Missouri with respect to the Section 1983 claim and Petitioner voluntarily dismissed, with prejudice, her Section 1983 claim against respondent, Emergency Assistance, Inc.

Respondent is constrained to restate the case and facts since petitioner's presentation is riddled with inaccuracies and statements that are unsupported by the record.

In November, 1971, the City of Kansas City, Missouri, received funds from the U. S. Department of Housing and Urban Development (HUD) pursuant to Title I of the Demonstration Cities and Metropolitan Development Act

of 1966, for what is commonly known as the Model Cities program. Emergency Assistance, Inc. was created in or about 1971 for the purpose of providing emergency monetary assistance to the poor utilizing Model Cities program funds, made available under a contractual arrangement by the City of Kansas City, Missouri. The City and Emergency Assistance entered into contracts whereby the City provided Model Cities funds to Emergency Assistance to operate an emergency assistance program for the poor in Model Cities program areas for the years 1971-1975.

In operation, Emergency Assistance staff personnel would interview and screen applicants for assistance, make a determination as to their eligibility and needs, and distribute funds to them or to creditors on their behalf. Reimbursement for expenses (both administrative and distributional) would then be made to Emergency Assistance by the City.

The persons employed by Emergency Assistance, of whom plaintiff was one, were involved on a daily basis in interviewing applicants, investigating their needs, making decisions as to their eligibility and requirements, preparing documentation with respect to the same, and distributing funds. These activities, which comprised the whole function of Emergency Assistance, were carried on entirely by Emergency Assistance personnel. Emergency Assistance maintained its own bank account, drew checks for its necessary expenditures thereon, which were signed by Emergency Assistance personnel, and maintained its own offices (which were not associated with any City offices). Pursuant to its contract, Emergency Assistance was to file with the City, on a monthly basis, a report concerning its activities.

From time to time City personnel provided certain technical aid to Emergency Assistance in explaining the

HUD guidelines; and at the outset of the program, and occasionally thereafter, gave training to Emergency Assistance employees in how to interview applicants and evaluate their requests.

The governing body of Emergency Assistance was its Board of Directors, all private citizens except for one City employee who sat as an "ex-officio," non-voting member of the board. None of the Emergency Assistance directors were City Council members. Emergency Assistance personnel answered to the Emergency Assistance staff, who in turn were responsible to its Executive Director, who in turn was responsible to the Emergency Assistance Board of Directors. The board was fully autonomous.

The Mayor of Kansas City designated the persons who would make up the Board of Directors of Emergency Assistance. However, this was largely an exercise in formality, since recommendations for board positions were made by the residents of the areas to be served, and since the Mayor was chosen to exercise this function simply by virtue of his titular position rather than in the performance of any City duties, as such.

Pursuant to its contract with the City, Emergency Assistance was required to observe certain HUD sponsored guidelines in respect of its employee relations. Those guidelines, as paraphrased and synthesized, required the following of Emergency Assistance: that it submit a job description for each employment position detailing the duties, minimum qualifications and salary range therefor; that it register any employment vacancies with the CDA (an agency of the City), advertise and interview simultaneously with the CDA for those positions so that the CDA could maintain a "job bank" list of all potential employees for all Model Cities programs, and request referrals

of qualified applicants from the CDA's "job bank"; that it obtain approval from the CDA, based upon justification, for hiring an employee who was not a model neighborhood resident; that it submit a monthly report to the CDA on employee status, including salary changes; that it submit a monthly report to the CDA on job applicants who were referred to it; that it adopt a plan of salary and wage administration; that it prohibit an employee from occupying a conflicting job position; that it provide a specified amount of "release time" for employees who were pursuing "career development training" and provide for pay increases for those who successfully completed such training; that it establish "a suitable procedure for handling disciplinary actions and grievances"; that it notify the CDA of any suspension or termination of personnel; that it provide a right of appeal to the "Model Cities Board of Appeal and Review" in connection with employee disputes; and that it permit the CDA to attempt conciliation with respect to any employee dispute.

As noted, all of the rights of the employees and obligations of the corporation where contractual in nature rather than something mandated by a statute or City ordinance.

Petitioner, Paulette Thompson Massey, a Black female, commenced her employment as Administrative Officer with Emergency Assistance on April 17, 1972. She applied for the position at the physical location of the personnel department of the City of Kansas City, Missouri, as did a few other applicants near the corporation's inception. The CDA in its administration of the Model Cities program, allowed use of its space as a matter of convenience for Model Cities agencies until such time as Model Cities agencies could acquire their own offices.

Petitioner was terminated in August, 1974. She subsequently filed a complaint with the Equal Employment Opportunity Commission (EEOC) on August 30, 1974. Following a hearing before the Model Cities Board of Appeal and Review, and pursuant to a settlement and compromise agreement, Petitioner was reinstated with back pay.

Emergency Assistance, Inc. advertised for applicants for the position of Director in December, 1974. Petitioner submitted her application in response to the advertisement but was rejected by the Board of Directors.

Following her rejection for the position, Petitioner questioned James Jackson, one of two males on the nine person Board of Directors of Emergency Assistance and Chairman of the personnel committee, as to why she was not selected for the position. Following an unrecorded exchange with Mr. Jackson, Petitioner has interpreted Mr. Jackson's comments as having been ". . . that the Board would not consider a female for the position because a female could not handle the job". At Trial, Mr. Jackson testified that this comment was made in jest, was his own and not the Board's and that his ultimate decision in selecting a new director was based on his evaluation of qualifications and not upon the sex of the candidates.

Subsequently, a male was hired for the position. Petitioner was subsequently terminated. She filed another complaint with EEOC on June 24, 1975, charging discrimination on the basis of her sex for denying her a promotion to the position of Director. She amended the complaint to include the City of Kansas City, Missouri, on December 1, 1975. On December 3, 1979, EEOC rendered and issued its determination of reasonable cause to believe the allegations of petitioner's complaint. EEOC issued its letter of right to sue on June 3, 1980.

The District Court sustained Respondent Kansas City, Missouri's Motion for Directed Verdict on the Section 1983 claim at the close of Petitioner's evidence and the petitioner voluntarily dismissed, with prejudice, her Section 1983 claim as to Respondent, Emergency Assistance, Inc. The Court dismissed the Title VI claim against both Respondents for lack of subject matter jurisdiction finding Respondents were not employers within the meaning of Title VII. The Eighth Circuit Court of Appeals upheld the District Court's decision.

REASONS FOR GRANTING (OR REFUSING) THE WRIT

1. The Decision Below Does Not Conflict With the Decisions of Other Courts of Appeals in the Criteria Used to Determine Whether a Person Who Is Not the Employer-in-Fact Is an "Employer" Within the Meaning of Title VII.

Title VII, 42 U.S.C. Section 2000e(b) defines employer as: "A person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in a current or preceding calendar year and any agent of such a person."

The Petitioner charges that her employer-in-fact, Emergency Assistance, Inc., which never had fifteen or more employees and thus would not be subject to the jurisdictional requirements of Title VII, was the agent of the City of Kansas City, Missouri, a political subdivision, and therefore the principal's employees should be counted along with Emergency Assistance, Inc.'s employees, to meet the jurisdictional requirements under Title VII. In spite of Petitioner's argument, Courts of Appeals need the flexi-

bility to be able to utilize difference standards to determine whether a person is an "employer" due to its relationship with the employer-in-fact, which has less than fifteen employees.

In reaching its decision that the City of Kansas City, Missouri, was not an employer in the present case, the District Court applied the "single employer" test adopted by the Eighth Circuit Court of Appeals in *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977). The four pronged test considers: (1) interrelation of operations between the two entities; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. Petitioner contends that application of said test by the District Court was error.

According to Schlei & Grossman, the authority cited by Petitioner, different theories, though overlapping, may be used to determine whether an entity which is not the employer-in-fact, but rather has a relationship with such employer-in-fact, is an employer within the meaning of Title VII: (1) The Single Employer Theory; (2) the Joint Employer Theory; (3) the Agent Theory; and (4) Special Application of Integrated Enterprise Theory to Employer Associations. B. Schlei & P. Grossman, *Employment Discrimination Law* (2nd Ed. 1983) at 1000.

The *Single Employer Theory* allows ". . . separate entities" to be ". . . treated as a single employer for purposes of counting and liability . . ." *Id.* The factors considered to determine whether separate entities may be treated as one are those applied in *Baker*. Schlei & Grossman at 1000.

The *Joint Employer Theory* is applied ". . . to obtain jurisdiction over a company which is unrelated to the employer-in-fact but exercises sufficient day-to-day control

over (an employee-in-fact of another company) . . . so as to become a co-employer . . ." *Id.* at 1001. The following are considered in determining whether the two companies are joint employers: control of hiring, discipline or discharge of employees of the employer-in-fact; control of the work schedules and work assignments; or an obligation to train or pay such employees. *Id.* However, Schlei & Grossman note that no court has passed on the joint employer status absent a finding that the smaller company was the agent of the larger company. *Id.*

The *Agent Theory.* Title VII defines employer to include agent of employers. 42 U.S.C. Section 2000e(b). Since a statutory definition of agent has not been enacted the common law definition is applied.

Special Application of Integrated-Enterprise Theory to Employer Associations. A special application of the integrated enterprise theory is made in instances where employer associations have less than 15 employees but own and operate a central hiring hall and control all labor relations policies. *Id.*

The fact that one of the entities sought to be charged as an "employer" is a political subdivision should make no difference as the test of *Baker* can still be applied. Apparently, Petitioner fails to understand the reasoning in the cases cited in Petitioner's Brief as support of her position; however, a thorough reading of the cases will indicate that the decisions of the Court of Appeals do not conflict and thus allow *Baker* to be applied in matters such as the instant case.

Some courts have actually applied the agency theory in cases where one of the jointly charged employers was a political subdivision. In *Curran v. Portland Superintending School Comm.*, 435 F. Supp. 1063, 1073 (D.Me. 1977),

the District Court determined that though the city was not the plaintiff's employer, the city was sufficiently involved in the employment process (it appropriated funds for salaries) that it must be considered an employer along with the school district.

A reading of its opinion does not indicate whether the court felt it necessary to apply specifically the single employer theory or the joint employer theory to make its determination; but rather, due to the nature of the organization of the city and the school board and their relationship dealing with the allocation of funds for salaries and budgetary control of salaries, the court made its determination that the city was an employer by virtue of their agency relationship. The fact of budgetary or financial control is an appropriate component of agency, especially as in *Curran,* where the funds allocated by the City determined the expenses of the school system as it related to salaries. The case is distinguishable from *Oaks v. City of Fairhope, Ala.,* 515 F. Supp. 1004 (S.D.Ala. 1981) wherein the Court determined that though the city allocated funds to the library there was no indicia of control exercised over the library board or its employees as ". . . under Alabama law the Library Board has full power and authority to control the expenditure of all funds received by the Library or appropriated to the Library." *Id.* at 1016.

Oaks specifically cites *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), wherein the court rejected the argument that a different test should be applied to a governmental employer as opposed to a private employer, stating:

> The relevant legislative history of the 1972 amendments extending Title VII to the States as employers does not, however, support such a result. Instead,

> Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. *Id.* at 1036.

In *Rogero v. Noone,* 704 F.2d 518 (11th Cir. 1983), plaintiff sued the county tax collector for unlawful discharge in violation of Title VII and 42 U.S.C. Section 1983, but failed to name the county as a party defendant, contending the tax collector was the agent of the county and therefore there was no need to actually name the county in the suit. *Id.* at 520. The tax collector had less than the required number of employees. Plaintiff urged the court to count all county employees to meet the jurisdiction requirement. *Id.* at 519. However, the Court granted defendant's motion for summary judgment holding that the tax collector was not employer within the meaning of Title VII since the county was not a party defendant and could not be counted for jurisdictional purposes. *Id.*

In *Rogero,* common law principles of agency were applied to determine whether the tax collector was an agent of the county as that was the only theory available to the Court to "liberally" classify the collector as an employer. There was no need for the application of the single employer theory or the joint employer theory to determine whether the collector and the county should be consolidated for jurisdictional purposes as the county ". . . was not made a party to this action and that is the omission critical to our decision". *Id.* at 520.

The court in the case of *Vanguard Justice Society, Inc. v. Hughes,* 471 F. Supp. 670, 696 (D.Md. 1979), said, ". . . (I)t is generally recognized that the term employer as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether

that party may technically be described as an "employer" of an aggrieved individual as that term has generally been defined at common law." 471 F. Supp. at 696 [11, 12].

The cases cited by Petitioner give ample reason for the need of the Courts to have ample flexibility in tests to apply to determine whether a related entity is an employer pursuant to Title VII. Since the term is to be given liberal construction, the Courts normally apply all theories, or aspects of all tests, in an attempt to find the related parties as an "employer". See *Quijano v. Univ. Fed. Credit Union,* 617 F.2d 129 (5th Cir. 1980).

The test of *Baker* can be applied in all employment situations, whether or not a political subdivision is a party, as the District Court so applied the four factors of the test at trial below. *Massey v. Emergency Assistance, Inc., et al.,* 580 F. Supp. 937 (1983). There may not be, although there can exist, the idea of common ownership. However, that is only one approach to the test. The other approach is financial control.

It appears that the Courts are mainly concerned with indicia of control that the larger entity exhibits over the smaller and not the status of the entity as a private business or a political subdivision. See *Barlow v. Avco Corporation, et al.,* 527 F. Supp. 269 (1981); *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338 (D.C. Cir. 1973). A political subdivision can control a business entity in the same way that another business entity can control it. The fact that the Court in *Dumas v. Town of Mt. Vernon, Ala.,* 612 F.2d 974 (5th Cir. 1980), refused (in dicta) to apply the *Baker* test to consolidate the town, county personnel board and the town's officials for jurisdictional purposes is not on point with the instant case. The individuals named as defendants could not be counted twice (for Title VII pur-

poses and for 42 U.S.C. Section 1981, 1983, 1985(3) and 1986 purposes) and a thorough reading of the opinion makes it clear that the county personnel board had autonomy apart from the political subdivisions which allowed said county personnel board to administer their civil service systems under some set of civil service rules.

Finally, the cases of *Owens v. Rush,* 636 F.2d 283 (10th Cir. 1980), *Ayres v. International Brotherhood of Electrical Workers,* 666 F.2d 441 (9th Cir. 1982), *Trevino v. Celanese Corporation,* 701 F.2d 397 (5th Cir. 1983) and *Spirt v. Teachers Insurance and Annuity Association,* 691 F.2d 1054 (2nd Cir. 1982) are not in point and irrelevant to any issue raised in the instant case.

2. The Decision Below Does Not Raise Any Significant Problem Concerning the Choice of a Theory Courts Apply to Determine Whether an Entity Is an Employer Within the Meaning of Title VII.

Several theories may be applied to determine whether an employer who is not the employer-in-fact should be consolidated with a smaller employer to meet the 15 employees requirement of Title VII. But because of the different kinds of employers covered by the Act (individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations and legal representatives) no single standard should be applied to all employers. There is no need to designate a single standard or theory to be applied when facing the issue of consolidation depending on the type employer involved, as the Courts need flexibility to deal with different employers with different legal status and changing circumstances.

3. Whether the Test Applied in Determining the Relationship Between Two Private Entities As an Employer Is Applicable When a Government Subdivision Is an Alleged Employer.

The test applied in *Baker*, supra, would and should be applicable to the factual situation here concerning governmental agencies, as the same test can be applied. See *Massey v. Emergency Assistance, Inc.*, 580 F. Supp. 937 (1983); *Massey v. Emergency Assistance, Inc.*, 724 F.2d 690 (1984).

4. The Trial Court Did Not Err in Sustaining the City's Motion for Directed Verdict Against Petitioner's Claim of Sex Discrimination Asserted Under 42 U.S.C. Section 1983.

The Trial Court sustained the City's Motion for a directed verdict because it heard no evidence of any action by any officer, agent or employee of, or official action on the part of City itself, to be causally related to the matters of which Plaintiff complains. In so ruling, the Court relied upon *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

It was incumbent upon Petitioner to prove that Emergency Assistance, Inc. was the agent of the City of Kansas City, Missouri. Failure to so do, as herein, is fatal. Petitioner voluntarily dismissed her 1983 claim against Respondent Emergency Assistance, Inc. so Respondent shall not speculate further.

CONCLUSION

The Writ of Certiorari should not issue as the Petitioner has failed to document any diversity of opinion between the Circuits with regard to the issues of this case and the Petitioner has failed to demonstrate any clear error in the courts below.

Respectfully submitted,

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